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No. 08-534

In the

Supreme Court of the United States

BRADLEY RICHLIN, LANCE RICHLIN, MARK MANNIS, ABIGAIL RICHLIN SCHWARTZ, LOUISE RICHLIN, ELYSSA PARTON and MICHELLE FORKEL,

Petitioners,

vs.

METRO-GOLDWYN-MAYER PICTURES INC., GEOFFREY PRODUCTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Ninth Circuit itself stated in *Aalmuhammed v. Lee*, the Ninth, Second and Seventh Circuits are all in accord that to be deemed a "joint author" of a copyrighted work a contributor must demonstrate that each of the putative authors mutually intended to be joint authors.

2. Whether the Ninth Circuit correctly determined that Maurice Richlin ("Richlin"), the co-author with Blake Edwards ("Edwards") of a treatment (the "Treatment") for the original 1963 motion picture *The Pink Panther* (the "Motion Picture"), was not a joint author of the Motion Picture where no one, including Richlin himself, ever intended Richlin to be a joint author of the Motion Picture.

3. Whether this Court should review Petitioners' claim, purportedly arising under *Stewart v. Abend*, that they owned an interest in the purported renewal term copyright of the Treatment when, as found by the District Court and the Ninth Circuit, they expressly waived that claim.

4. Whether the Ninth Circuit correctly held that there is no statutory renewal term copyright for the Treatment because the Treatment: (a) was merely an incorporated component of the Motion Picture; (b) was never separately copyrighted, *i.e.*, published, registered or renewed; and (c) as Petitioners admitted, never had its own independent statutory original or renewal term copyright.

5. Whether there are compelling reasons to review Petitioners' renewal term copyright claim arising under the Copyright Act of 1909 (the "1909

Act") and *Stewart v. Abend* (interpreting the 1909 Act), where the last original term of copyright for any work subject to the 1909 Act's two-term system ended on December 31, 2005, so that it is unlikely that there will be very many, if any, claims in the future involving the 1909 Act's statutory copyright principles addressed in this case.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners Bradley Richlin, Lance Richlin, Mark Mannis, Abigail Schwartz, Louise Richlin, Elyssa Parton and Michelle Forkel are individuals.

Respondent Metro-Goldwyn-Mayer Pictures Inc. states that its parents are MGM Holdings, Inc., MGM Holdings II, Inc. and Metro-Goldwyn-Mayer Inc.

Respondent Geoffrey Productions, Inc. states that it has no parent companies and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

There is no "compelling reason" for this Court to review the Ninth Circuit's well-supported opinion here. While this case involved the interesting history behind the popular 1963 motion picture *The Pink Panther*, it was otherwise a straightforward copyright dispute dealing with uncontroversial joint authorship law and long-settled principles regarding the requirements for independent statutory copyright under the law of the 1909 Act.[1]

In short, Petitioners have pursued this action to this point because they refuse, unreasonably, to accept well-settled law. Petitioners' overall argument, in the petition and from the beginning of this lawsuit, is characterized by their repeated question: Why is it that in *Stewart v. Abend*, 495 U.S. 207 (1990) the successor of the author of the story underlying the film *Rear Window* was entitled to vesting or "reversion" of the renewal term copyright in that story under § 304 of the Copyright Act, but here, Petitioners, the heirs of a co-author of the Treatment for the Motion Picture, are not? *See* Pet. 2-3, 16-20.

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[1] The current Copyright Act, known as the Copyright Act of 1976 (the "Copyright Act"), effective as of January 1, 1978, superseded the 1909 Act. The law under the 1909 Act remains pertinent to this case because a) it still applies to certain issues for works created prior to 1978; and b) the Copyright Act incorporates certain key principles of the law under the 1909 Act. *See* Pet. App. 6a-7a, 10a-11a. For example, the provisions concerning the 1909 Act's two-term system and who is entitled to the renewal term copyright are incorporated in § 304 of the Copyright Act. 17 U.S.C. § 304.

The Ninth Circuit, applying bedrock principles of copyright law, directly and correctly answered Petitioners' question:

> Richlin died in 1990. Had the Treatment become the subject of statutory copyright as a separate and independent work, its renewal term would not commence until 1991. According to the Richlin heirs, because Richlin, like Woolrich [in *Stewart*], died before the right to renew the copyright vested, the right to renew the copyright in the Treatment reverted to them. The disconnect in this theory is that, unlike the story "It Had to Be Murder," an independent work, the Treatment was never the subject of federal copyright protection as an independent work. Because it never was invested with statutory copyright protection, there was no right to renew and, therefore, no renewal right to revert to the Richlin heirs.

Pet. App. 27a-28a (emphasis added).

> In the end, the Richlin heirs ask us to consider one question: "For what reason should Richlin's heirs be treated any differently than the heirs of any other author?" The answer is clear: Richlin failed to secure federal statutory copyright protection for the Treatment. Therefore, the Treatment as such was never invested with statutory copyright, and a right to renew the original term of statutory copyright neither vested in Richlin nor reverted to his heirs. Because Richlin neither co-owned nor coauthored the Motion Picture, neither he nor his heirs have any interest in its copyright.

Pet. App. 32a-33a.

Contrary to Petitioners' assertion (*e.g.*, Pet. 2-3, 25), the Ninth Circuit's decision does not conflict in any way with *Stewart* because the underlying work in *Stewart* had its own independent *statutory* copyright, and the Treatment here did not. It is well-settled that the term "copyright" in the 1909 Act, as now incorporated in § 304(a) of the current Copyright Act, refers exclusively to "statutory" copyrights. *See Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998). Since there never was a statutory copyright in the Treatment, a point that Petitioners conceded, there was no cognizable renewal term copyright in the Treatment. Without a statutory renewal copyright in the Treatment, there was simply nothing that could have vested in Petitioners under § 304 of the Copyright Act.

Respondents moved for summary judgment on this very basis. In response, Petitioners abandoned their claim based on reversion of the purported renewal copyright in the Treatment, and instead claimed that Richlin was a joint author of the entire Motion Picture because he was one of the two authors of the Treatment. Given the reality of major motion picture production, the very idea that the producers of the Motion Picture, who invested millions of dollars to produce the Motion Picture, ever intended to be joint authors with Richlin, which would have given him the unfettered right to exploit the Motion Picture on his own, merely because he contributed a 13-page rough outline is absurd. That is why, as the courts below held, all of the written agreements and other undisputed evidence established that the parties, including Richlin himself, never intended Richlin to be a joint author in the Motion Picture.

Now, in what is merely an effort to obtain yet another level of appellate review, Petitioners assert that there is a supposed "split" between the Ninth Circuit, on the one hand, and the Second and Seventh Circuits, on the other, regarding the standards for determining the mutual intent required for joint authorship. Pet. 10-13. Petitioners are plainly wrong. These circuits uniformly require a person claiming to be a joint author of a work to prove that all parties intended to be joint authors of the work with each other. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1233-34 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195, 201-02 (2d Cir. 1998); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

Indeed, Petitioners' contention is flatly contradicted by the Ninth Circuit's own statement that its standards for determining joint authorship are essentially the same as those of the Second and Seventh Circuits:

> Although the Second and Seventh Circuits do not base their decisions on the word "authors" in the statute, the practical results they reach are consistent with ours. These circuits have held that a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.

Aalmuhammed v. Lee, 202 F.3d at 1233-34.

Applying this uniformly-accepted requirement here, the Ninth Circuit correctly held that Richlin was not a joint author of the Motion Picture because the evidence demonstrated unambiguously that Richlin was never intended to be a joint author.

Pet. App. 15a. Petitioners do not even attempt to meet their burden of demonstrating how a court in the supposedly "conflicting" Second or Seventh Circuits could have reached a different result on these same facts. Accordingly, the Ninth Circuit's opinion (the "Opinion") is not "in conflict with the decision of another United States court of appeals" (Sup. Ct. R. 10(a)) and there is no need for the Court to grant certiorari here.

STATEMENT OF THE CASE

Respondents hereby incorporate and respectfully refer the Court to the Opinion for an accurate and detailed recitation of the material facts and procedural history of this case. Pet. App. 4a-8a.

REASONS FOR DENYING THE PETITION

I. There Is No "Circuit Split" Relating To The Ninth Circuit's Determination That Richlin Was Not A Joint Author Of The Motion Picture.

Petitioners erroneously assert that the Ninth Circuit's approach for determining when a person can be considered a joint author of a joint work, set forth in *Aalmuhammed* and applied by the Ninth Circuit here, conflicts with the Second and Seventh Circuits' approach. Pet. 9-10. There is no such "circuit split" concerning any issue in this case.

A. The Circuits Uniformly Require That, To Be Deemed A Joint Author, A Contributor Must Prove That Each Joint Author Intended To Be Joint Authors With The Other.

Because a finding of joint authorship has such significant consequences for the authors and the use of the work,[2] the Second, Seventh and Ninth Circuits, among other circuits, all hold that for a contributor to be deemed a joint author he or she must prove something substantially more than merely that his or her contribution was "intended to be merged . . . into a unitary whole." *See Aalmuhammed,* 202 F.3d at 1231-32; *Thomson,* 147 F.3d at 201-02; *Erickson,* 13 F.3d at 1069; and *Childress,* 945 F.2d at 505-07. The Second, Seventh and Ninth Circuits are all in accord that a person claiming to be a joint author of a work must establish that each of the joint authors fully intended to be joint authors with each other. *See Aalmuhammed,* 202 F.3d at 1234; *Thomson,* 147 F.3d at 200; *Erickson,* 13 F.3d at 1071-72.

There is, thus, no disagreement or "split" among the circuits on the single dispositive joint authorship issue here: that the Ninth Circuit correctly found, not only that Petitioners failed to meet their burden of proving that the parties intended to be joint authors of the Motion Picture, but, in fact, that

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[2] For example, each "joint author" of a joint work is entitled to an equal undivided interest in the whole copyright — "in other words, each joint author has the right to use or license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made." *Thomson,* 147 F.3d at 199.

the putative authors, Edwards, Mirisch Co. (the producer) and Richlin did *not* intend to be co-authors with each other in the Motion Picture. Pet. App. 15a-16a.

The Ninth Circuit in *Aalmuhammed* repeatedly cites the Second Circuit's decision in *Thomson* for support throughout its opinion. The *Aalmuhammed* court made it clear that its standard is in accord with the Second Circuit's joint authorship analysis, "especially the thoughtful opinion in *Thomson v. Larson*." *Aalmuhammed*, 202 F.3d at 1234. For example, the Ninth Circuit stated:

> The Second and Seventh Circuits have likewise concluded that contribution of independently copyrightable material to a work intended to be an inseparable whole will not suffice to establish authorship of a joint work. Although the Second and Seventh Circuits do not base their decisions on the word "authors" in the statute, the practical results they reach are consistent with ours. These circuits have held that a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.

Aalmuhammed, 202 F.3d at 1233-34 (emphasis added).

Here, the Ninth Circuit correctly found that all the evidence, including Richlin's Assignment, Employment Agreement and the surrounding circumstances, established that Richlin was never intended to be a joint author of the Motion Picture. Pet. App. 14a-15a.

B. The Ninth Circuit's Three Joint Authorship Criteria Do Not Conflict With The Second And Seventh Circuits' Approach.

In *Aalmuhammed*, the Ninth Circuit identified three non-exclusive criteria that are to be used, in the absence of a contract, to aid a court in determining whether the parties are joint authors in a joint work:

> First, we determine whether the "putative coauthors ma[de] objective manifestations of a shared intent to be coauthors." A contract evidencing intent to be or not to be coauthors is dispositive. Second, we determine whether the alleged author superintended the work by exercising control. Control will often be the most important factor. *Id.* Third, we analyze whether "the audience appeal of the work" can be attributed to both authors, and whether "the share of each in its success cannot be appraised." (quotations omitted).

Pet. App. 12a-13a (citing *Aalmuhammed*, 202 F.3d at 1234).

Petitioners assert vaguely that these three factors "improperly constrict" the definition of an author of a joint work or otherwise somehow conflict with the other circuits' approach. Pet. 9-10. Petitioners are wrong.

Far from conflicting with the Second and Seventh Circuit approach, the Ninth Circuit's three joint authorship criteria follow from the Second and Seventh Circuit decisions. *See, e.g.*, *Aalmuhammed*, 202 F.3d at 1234 ("In determining whether the

parties have the intent to be joint authors, the Second Circuit looks at who has decision making authority, how the parties bill themselves, and other evidence.") (citing *Thomson*, 147 F.3d at 202-03). For example, the first factor identified in *Aalmuhammed*, that "an author superintends the work by exercising control," is a direct quote from *Thomson*. *Aalmuhammed*, 202 F.3d at 1234.

Petitioners then attempt to point out three ways in which the Ninth Circuit's criteria supposedly conflict with the Second and Seventh Circuit approach. Each of their assertions is patently wrong.

1. There Is No Circuit Conflict Regarding Analysis Of Objective Manifestations Of A Shared Intent To Be Joint Authors.

Contrary to Petitioners' assertion (Pet. 10-11), there is neither a conflict nor an error in the Ninth Circuit's requirement that a court inquire whether the "putative coauthors made objective manifestations of a shared intent to be coauthors." *Aalmuhammed*, 202 F.3d at 1234. In fact, this criteria came directly from the Second and Seventh Circuit decisions. *See, e.g., Thomson*, 147 F.3d at 202-04 ("Under *Childress*, a specific finding of mutual intent remains necessary. We therefore turn to an examination of the factual indicia of ownership and authorship relevant to this inquiry, as they are defined in the prior cases.") (citation omitted).

Petitioners erroneously assert that the Ninth Circuit in *Aalmuhammed* erred because it "misread" the Second and Seventh Circuit decisions. Pet. 10. Petitioners claim that cases such as *Thomson* (2d Cir.) and *Erickson* (7th Cir.) hold only "that an

expressed intent *not* to be joint authors was relevant in determining co-authorship." Pet. 10-11 (emphasis in original). Petitioners could not be more wrong. In fact, these decisions hold exactly the opposite. They hold that a "co-authorship *claimant* bears the burden of establishing that each of the putative co-authors . . . *fully intended* to be co-authors." *Thomson*, 147 F.3d at 200 (emphasis added). *See also Erickson*, 13 F.3d at 1072 ("Because [the claimant] cannot establish the requisite intent for *Much Ado* or *Prairie Voices*, the actors cannot be considered joint authors for the purposes of copyright protection.").

The Ninth Circuit here, in accord with the Second and Seventh Circuits, properly placed the burden on Petitioners to show there were objective manifestations of an affirmative intent to make Richlin a joint author of the Motion Picture. The Ninth Circuit correctly held that Petitioners failed to submit any such evidence. Pet. App. 14a-16a. Contrary to Petitioners' baseless assertions,[3] all of the evidence demonstrated objective manifestations

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[3] Petitioners are wrong to criticize the Ninth Circuit's finding that the Assignment and Employment Agreement were objective manifestations of the parties' intent *not* to be joint authors. Pet. 11 n. 6. The Ninth Circuit quite clearly and correctly held that the Assignment — which assigned all rights, including control and copyright, in the Treatment and any motion picture derived from it, *exclusively* to Mirisch Co. — and the Employment Agreement — in which Richlin agreed that Mirisch Co., as employer for hire, would be the sole "author" of the Motion Picture — were diametrically opposed to any "intent" to be deemed joint authors in the Motion Picture. *See Thomson*, 147 F.2d at 204 n. 25 ("[A] reservation of rights provision 'suggest[s] that the parties did not consider themselves joint authors of a single work.'") (citing *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 22 (2d Cir. 1976)).

of the parties' understanding that Richlin was expressly not intended to be a joint author of the Motion Picture.

2. There Is No Circuit Split Regarding The Significance Of Whether The Alleged Author "Superintended The Work By Exercising Control."

Petitioners erroneously assert that the Ninth Circuit is somehow in conflict with the Second and Seventh Circuits because it "has overemphasized the control factor." Pet. 13.

First, there is no such disagreement among the circuits. Again, as with the development of the "shared intent" criteria, the Ninth Circuit based its "control" criteria on the Second Circuit approach. *See Aalmuhammed*, 202 F.3d at 1234 (citing *Thomson*, 147 F.3d at 202). The same exact "control" or "decision making" criteria are in *Thomson* and *Erickson*. *See Thomson*, at 202-203 ("An important indicator of authorship is the contributor's decision making authority over what changes are made and what is included in a work.")(citing *Erickson*, 13 F.3d at 1071-72). For example, in *Thomson*, the Second Circuit relied in large part on the fact that the playwright Larson had maintained sole overall decision making authority over the creative content of *Rent* in rejecting Thomson's claim to joint authorship of the play. *Thomson*, 147 F.3d at 204.

Petitioners cite to *Berman v. Johnson*, 518 F. Supp. 2d 791, 796-97 (E.D. Va. 2007) as evidence of a purported circuit split on the "control" issue. Pet. 12-13. Specifically, the court in *Berman* stated:

> Defendants cite to the Ninth Circuit's decision in *Aalmuhammed v. Lee*, which held that joint authorship requires a party (i) to make an independently copyrightable contribution and (ii) to establish "authorship" by demonstrating (a) control over the creation of the work, (b) "objective manifestations of a shared intent to be coauthors," and (c) audience appeal based on each contributor's contribution. 202 F.3d 1227, 1232 (9th Cir. 2000). By contrast, the Second and Seventh Circuits hold that authorship of a joint work is established merely by "establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors." *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998).

Berman, 518 F. Supp. 2d at 796-97. The court, apparently accepting the defendants' interpretation that under *Aalmuhammed* joint authorship "requires" control, rejected the purported Ninth Circuit approach stating "[w]hile a strict application of the Ninth Circuit's rule would support defendants' argument, the facts highlight the rule's flaw." *Id.* at 797.

However, with all due respect to the district court in *Berman*, the Ninth Circuit did not impose a "requirement" that there must be control to establish joint authorship. The Ninth Circuit merely noted that "[c]ontrol in many cases will be the most important factor." *Aalmuhammed*, 202 F.3d at 1234. The three criteria identified by the Ninth Circuit in *Aalmuhammed* are simply meant to be a flexible

approach for determining whether the "mutual intent" requirement is met. The Ninth Circuit went on to say, for example:

> The best objective manifestation of a shared intent, of course, is a contract saying that the parties intend to be or not to be co-authors. In the absence of a contract, the inquiry must of necessity focus on the facts. The factors articulated in this decision and the Second and Seventh Circuit decisions cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much.

Aalmuhammed, 202 F.3d at 1235 (emphasis added).

As demonstrated above, the Ninth, Second and Seventh Circuits *all* require the plaintiff to show that all persons "fully intended to be co-authors." Accordingly, there is no circuit split.[4]

Second, even if there were such a split, which there is not, resolution of the issue one way or the other (*e.g.*, whether the court should give more or less significance to the control criteria) would have no impact on the result here. The Court of Appeals gave primary significance, not to the lack of control element, but to the fact that there were work for hire and assignment agreements making it clear, beyond

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[4] For similar reasons, the 2001 student note Petitioners cite (Pet. 9, n. 4) as calling the Ninth Circuit's approach "strikingly different" is fundamentally incorrect. *See* J. David Yarbrough, Jr., Comment, What's Mine Might Be Yours: Why We Should Rethink The Default Rule for Copyright Ownership in Joint Works, 76 Tul. L. Rev. 493, 508 (2001).

any doubt, that the parties, including Richlin himself, never intended Richlin to be a joint author of the Motion Picture.[5] Pet. App. 15a-17a.

3. The Question Of Whether A Joint Author's Contribution Needs To Be "Independently Copyrightable" Played No Role In This Case.

Petitioners next attempt (Pet. 14) to conjure a circuit split on the "independent copyrightability" requirement for joint authorship by citing to Judge Posner's discussion in *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004). However, this also fails.

First, *Gaiman* does not disagree with the requirement that to be a joint author the person's contribution must be independently copyrightable. In fact, Judge Posner states:

> There has to be some original expression contributed by anyone who claims to be a co-author, and the rule (we'll consider an exception momentarily) is that his contribution must be independently copyrightable. *E.g.*, *Erickson v. Trinity Theatre, Inc.*, *supra*, 13 F.3d at 1071; *Aalmuhammed v. Lee*, *supra*, 202 F.3d at 1231.

Gaiman, 360 F.3d at 658 (emphasis in original). The *Gaiman* court merely goes on to discuss how there may be exceptions to this rule due to "the

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[5] Moreover, this is not a case where the contributor had some degree of control such that the significance a court should have accorded the factor would be arguable. Here, it was undisputed that Richlin had absolutely *no control* over any aspect of the Motion Picture. Pet. App. 16a-17a; ER 785.

nature of the particular creative process" that produces the work. *Id.* at 659.

Second, even if there were a circuit split, the "independent copyrightability" of Richlin's contribution was not at issue in this case. The parties assumed, for purposes of the subject motion, that Richlin's contributions to the Motion Picture were sufficiently "independently copyrightable" to satisfy any such requirement for joint authorship. Independent copyrightability played no role in the Ninth Circuit's decision. Because the "mutual intent" requirement was not met here, a decision by this Court on "independent copyrightability" would be immaterial to the resolution of this case. Accordingly, this is not the proper case for review of the "independent copyrightability" requirement.

II. Granting The Writ Would Serve No Practical Purpose, Because Petitioners Waived Their Argument Regarding A Purported Renewal Term Copyright In The Treatment.

Even where an issue of national importance is presented, which it is not here (see Point III below), certiorari may be denied where the Court's resolution of the issue presented would be irrelevant to the ultimate outcome of the case. The Court should deny review of Petitioners' claim (Pet. 16-25) that they are entitled to rights by virtue of the purported renewal term copyright in the Treatment (as distinguished from the Motion Picture) because they expressly waived that claim before the District Court. As the Court of Appeals found:

> . . . by the time the district court granted summary judgment in favor of MGM, the Richlin heirs had abandoned their argument based on a statutory copyright in the Treatment. Instead, they argued that they have a copyright interest in the Motion Picture as coauthors based on Richlin's coauthorship of the Treatment, which was incorporated into the Motion Picture.

Pet. App. 8a (emphasis added). This express abandonment/waiver, which is not challenged in the Petition, provides a wholly-independent basis for affirming the Ninth Circuit's decision, regardless of how this Court rules on the renewal term copyright claim. *See* Pet. App. 8a.

In the Complaint, Petitioners only sought a declaration that they were co-owners (together with Respondents) of a 50% share of the U.S. statutory renewal term copyright in the Treatment. ER 10.[6] Based upon this requested finding, Petitioners then: (i) requested a further declaration that the Motion Picture and all subsequent works "deriving from" the Motion Picture are derivative works of the Treatment, (*id.*); and (ii) sought, *inter alia*, an accounting for 50% of the profits received by Respondents arising out of the alleged exploitation of the Treatment in the Motion Picture and subsequent *Pink Panther* motion pictures during the renewal term of copyright of the Treatment. ER 10, 37.

On summary judgment, Respondents asserted that Petitioners' claims, as alleged in the complaint, failed because there was no independent statutory renewal

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[6] References to the page numbers of the documents contained in Appellants' Excerpts of the Record are cited as "ER __".

copyright in the Treatment, and therefore, nothing that could have vested in Petitioners under § 304 of the Copyright Act. ER 318-25. In their opposition, Petitioners expressly conceded that there was no independent existing copyright in the Treatment.[7] Petitioners instead asserted that their claim was not based on any statutory copyright in the Treatment, but, rather, was based on their new claim that Richlin's contribution to the Treatment made him a joint author of the Motion Picture.[8]

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[7] Petitioners acknowledged this point in multiple places in their opposition memorandum in the district court:

> "Plaintiffs concede that there should be no independent copyright in the Treatment, because the Treatment was incorporated fully into *The Pink Panther*." ER 443.
>
> "But Plaintiffs agree that there is no separate copyright in the Treatment, because it was incorporated in its entirety in the film." ER 444.
>
> "Defendants implicitly recognize this fact by arguing that there should be no separate copyright in the Treatment, a point with which Plaintiffs agree." ER 445.

[8] For example, in their response to Defendants' Statement of Undisputed Facts and Conclusions of Law, Petitioners stated:

> "No. 55 The Treatment does not have an independent copyright which is separate from the statutory copyright in *The Pink Panther*, which is undisputedly owned by Defendants." Response: "Undisputed. Defendants own the statutory copyright, but Plaintiffs have an equitable interest in the copyright." ER 473.
>
> "No. 56 There is no separate statutory renewal term copyright in the Treatment that could have reverted to Plaintiffs under § 304 of the Copyright Act." Response: "Undisputed. But Plaintiffs, as the

At the hearing on the motion, Petitioners again conceded there was no statutory copyright in the Treatment and re-affirmed that they were claiming relief solely based on a finding that Richlin was a joint author of the Motion Picture.[9]

The District Court confirmed that, pursuant to their own urging, Petitioners' *sole* claim in opposition to summary judgment was based on their argument that Richlin was a joint author of the Motion Picture:

> The plaintiffs acknowledge that the Treatment copyright is incorporated into the motion picture's copyright and was renewed by MGM. Their argument is not based on a separate copyright in the Treatment. Instead, they argue that they have copyright rights in the entire motion picture as co-authors of the motion picture based on Richlin's co-authorship of the Treatment.

Pet. App. 39a. (emphasis added).

On appeal, Petitioners retreated from their joint authorship claim and attempted to resurrect their claim based on a purported renewal copyright in the Treatment. Pet. App. 7a-8a. Responden ts opposed, claiming that Petitioners abandoned this argument before the District Court and could not pursue it for

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statutory heirs of a co-author of the copyrighted film, had a right to renew the copyright in the film, just as MGM did." *Id.*

[9] Mr. Schoenberg: "Again, we are not — we are not claiming a separate copyright in the treatment, we're saying that the treatment was merged, as an -- to quote the 1976 Act, 'into inseparable or interdependent parts of a unitary whole,' was merged into the movie." ER 765.

the first time on appeal. *See, e.g., Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996) (declining to decide an issue because "an appellate court will not hear an issue raised for the first time on appeal" and that "[t]o have been properly raised below, the argument must be raised sufficiently for the trial court to rule on it") (citation and internal quotations omitted); *Rothman v. Hosp. Service of S. California*, 510 F.2d 956, 960 (9th Cir. 1975) (declining to decide an issue not properly raised in the court below because plaintiff had "not presented persuasive arguments for making an exception to this rule").

The Ninth Circuit agreed that Petitioners had abandoned their claim based on copyright in the Treatment and on *Stewart v. Abend*. *See* Pet. App. 8a. Accordingly, there is no "compelling reason" for this Court to review this claim.

III. The Decision That There Was No Renewal Term Copyright In The Treatment Is Of Extremely Limited Significance And Does Not Warrant Review.

There is no "compelling reason" to review the renewal term copyright issue in this case because time has essentially run out for these kinds of claims.[10] The last renewal term copyright for any work subject to the 1909 Act's two-term system commenced on January 1, 2006. Given the Copyright Act's three-year statute of limitations, the number

[10] In fact, here, in addition to defending on the merits, Respondents asserted below that Petitioners' claims failed because they were time-barred by the statute of limitations and laches.

of cases, if any, to which a ruling on this issue would apply is extremely limited and becoming smaller each day.

By way of background, prior to January 1, 1978, U.S. copyright law was governed by the 1909 Act. Under the 1909 Act, federal statutory copyright protection *only* commenced upon the earlier of either (a) publication of a work with proper copyright notice; or (b) registration of the work with the Copyright Office. The duration of copyright protection under the 1909 Act was for two terms, an original and a renewal term, of 28 years each.

Congress substantially revised U.S. copyright law when it passed the Copyright Act, which became effective on January 1, 1978. The Copyright Act, as amended, eliminated the two 28-year term system in favor of a single term lasting the author's life plus seventy years. Most importantly, especially for the present case, the Copyright Act eliminated the 1909 Act's system of requiring registration or publication of a work in order to invest it with statutory copyright protection. Instead, federal statutory "[c]opyright in a work created on or after January 1, 1978 subsists from its creation . . . ." 17 U.S.C. § 302(a).

The last original term of copyright created under the 1909 Act ended on December 31, 2005 (*i.e.*, the end of the 28th calendar year of the initial term of copyright for works registered for copyright or first published in 1977, the last year of the 1909 Act). As of January 1, 2006, the time ran out to timely renew copyrighted works subject to the 1909 Act's two term system. Accordingly, while works subject to two-term copyrights can still be registered for renewal, those

renewals will no longer be "timely" and have lost some of the incentives provided in the Copyright Act, including the ability to cut off the rights of an owner of an existing derivative work prepared during the original term of copyright. *See, e.g.*, 17 U.S.C. § 304(a)(4)(A).

The renewal copyright issue in the Petition will rarely, if ever, arise again because, as noted above, the last date for commencement of the renewal term copyright for any work covered by the 1909 Act passed in 2006. This means that any statutory successor who did not file a registration for the renewal copyright by December 31, 2005, will not have the right to make any claims against any derivative works created during the original term of copyright. 17 U.S.C. § 304(a)(4)(A). Also, the Copyright Act's statute of limitations for claims seeking to establish copyright ownership or authorship is three years. Accordingly, such claims will soon be forever time-barred by the statute of limitations and/or by laches. Thus, the petition seeks to have this Court revisit *Stewart v. Abend* when there are likely to be only few, if any, similar cases going forward.[11]

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[11] Petitioners argue that a similar issue could be raised in the context of termination rights under § 304(c) of the Copyright Act. This case, like *Stewart*, does not involve termination rights and is not the proper vehicle for the Court to review such an issue.

IV. The Ninth Circuit's Decision That There Was No Cognizable Renewal Copyright In The Treatment Was Correct And Does Not Conflict With *Stewart v. Abend*.

As Petitioners undoubtedly recognized when they abandoned it before the District Court, their argument that they might have some right to a renewal copyright in the Treatment is without merit. As Petitioners conceded, because the Treatment was never separately copyrighted and was merely an incorporated component of the Motion Picture, there is *no* independent statutory copyright in the Treatment. ER 445, 473. The Ninth Circuit correctly concluded that without such an independent, separately registered statutory copyright for the Treatment, there cannot be a renewal term copyright of the Treatment. *See* Pet. App. 30a-32a. There were no renewal rights in the Treatment that could have ever vested in Petitioners under § 304(a) of the Copyright Act. *Id.*

A. Without A Statutory Renewal Term Copyright In The Treatment There Is No "Other Cognizable Copyright Interest" In The Treatment That Could Have Vested In Petitioners Under § 304.

To the extent Petitioners can claim to have rights in the purported copyright in the Treatment, it is solely by virtue of the renewal term vesting provisions of § 304(a) of the Copyright Act (which incorporates the pertinent provisions from its statutory predecessor, § 24 of the 1909 Act). *See Stewart*, 495 U.S. at 217.

Section 304(a) provides solely for the vesting and renewal of a "*copyright*." The courts have confirmed that Congress' use of the term "copyright" in the 1909 Act refers exclusively to "statutory copyrights." *See Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998); *accord Shoptalk, Ltd. v. Concorde-New Horizons Corp.*, 168 F.3d 586, 592 (2d Cir. 1999). Since § 304(a) incorporated the pertinent provisions from § 24 of the 1909 Act, *see Stewart*, 495 U.S. at 219, these cases also confirm that the use of the term "copyright" in § 304(a) refers solely to a "statutory copyright."

Accordingly, Petitioners could only succeed on their claim based upon the Treatment if there was an independently existing statutory copyright in the Treatment that vested in them pursuant to § 304(a). *See, e.g., Stewart*, 495 U.S. at 219. Here, however, there is no such copyright in the Treatment.

Petitioners conceded as much when, in their Statement of Genuine Issues of Fact and Conclusions of Law, Petitioners responded to Respondents' assertion that "[t]here is no separate statutory renewal term copyright in the Treatment that could have reverted to Plaintiffs under § 304 of the Copyright Act" as follows:

> "56. Undisputed. But Plaintiffs, as the statutory heirs of a co-author of the copyrighted film, had a right to renew the copyright in the film, just as MGM did."

ER 473.

B. The Ninth Circuit's Opinion Does Not Conflict With *Stewart v. Abend* Because There Is No Statutory Copyright In The Underlying Work Here.

Despite these authorities and clear principles, Petitioners maintain that, pursuant to the Supreme Court's decision in *Stewart v. Abend,* as the putative statutory successors of a joint author of the Treatment, they must somehow be entitled to some kind of interest in some renewal copyright. *See* Pet. 17-18. However, the Ninth Circuit correctly held that *Stewart* does not provide any support for a claim that is not based on a separate, pre-existing statutory copyright in a separate underlying work. Pet. App. 25a-28a.

Stewart confirmed that the rights of the owner of the copyright in a pre-existing work are not extinguished once it is incorporated into the derivative work, assuming the author of the pre-existing work has agreed to assign his renewal rights. *Stewart*, 495 U.S. at 216, 222-24. This holding, however, was made *solely* with respect to existing *statutory* copyrights in pre-existing works. This distinction is determinative here. In *Stewart*, the plaintiff held a separate statutory renewal copyright in the pre-existing underlying work. Here, there is no statutory renewal copyright for the Treatment. Without a statutory copyright, there cannot be any claim under § 304(a) or under *Stewart*.

Contrary to Petitioners' assertion, this does not require a finding, purportedly in conflict with *Batjac* or *Stewart*, that the Treatment was not in fact published with the Motion Picture. Rather, it rests

on the fact that the Treatment was an incorporated work that never had a statutory copyright. In *Batjac*, the Ninth Circuit distinguished *Stewart* on a similar basis:

> The Supreme Court affirmed this court's holding, finding that under § 24 [of the 1909 Act] the copyright in a pre-existing work is not extinguished during the renewal period with respect to its incorporation into the derivative work. *Id.* at 216, 110 S.Ct. 1750.
>
> The case did not involve common law copyrights. "It Had to Be Murder" was a statutorily copyrighted story whose motion picture rights had been sold to predecessors of Hitchcock and Stewart. Hitchcock and Stewart acquired the rights and made the movie "Rear Window." Any applicability of § 7 to an unpublished or common law protected right was not at issue.

Batjac, 160 F.3d at 1231 (citing *Stewart*) (emphasis added).

Similarly, in the *Husbands* decision cited by the Ninth Circuit (Pet. App. 28a-30a), the Copyright Office Board of Appeals rejected the same argument asserted here by Petitioners. In rejecting the Cassavetes heirs' claim that they must be entitled to renewal rights in the screenplay pursuant to *Stewart*, the Copyright Office ruled:

> Again, the lack of copyright registration for the original term for the screenplay considered by the Office to be authorship intimately intertwined in the integrated whole of the motion picture — which was registered for its original term of copyright — prevents a separate

> renewal registration for the screenplay which under Office registration practices cannot be said to be analogous to the *Stewart v. Abend* story which was incorporated not into an integrated, larger whole but into a composite, or collective, work [*i.e.*, the magazine in which the "It Had to Be Murder" story was first published] in which the contributions sustained their independent identities.

Husbands Decision at 8.

In § 304(a), Congress provided for the author, or his widow and children if the author did not survive, to have an opportunity to partake in the success of a work that had its own, independent statutory copyright (*i.e.*, it had been published with notice or registered), by granting them the right to claim the statutory renewal copyright for that specific work. *See, e.g., Stewart*, 495 U.S. at 218-19. By its express terms, § 304(a) provides solely for the vesting of statutory copyrights, and not for the vesting of some "other interest" in a preliminary work that was merely an incorporated component of a final work and never separately copyrighted.[12] The Ninth Circuit, thus, correctly held that Petitioners have no basis for any of their claims as purported co-owners of the renewal term copyright in the Treatment.

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[12] If Petitioners were to prevail on their renewal claim based upon the Treatment, it would create vast uncertainty in the market for any work, such as a motion picture, that had unregistered incorporated components. Parties, such as assignees and licensees of rights in the motion picture, would have no means of determining from Copyright Office records whether an unregistered renewal term copyright in an incorporated component had vested in a party other than its assignor. *See Husbands* Decision at 6.

CONCLUSION

Respondents respectfully request that, for the foregoing reasons, the petition be denied.

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